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IN THE
COURT OF APPEALS OF INDIANA

ANTHONY SHANE FOSTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 31A04-0601-CR-27
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HARRISON SUPERIOR COURT
The Honorable Roger D. Davis, Judge
Cause No. 31D01-0505-FB-379

September 18, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Anthony Shane Foster appeals from his convictions for Burglary,[1] a class B felony, Theft,[2] a class D felony, and Auto Theft,[3] a class D felony. Specifically, Foster argues that the trial court committed fundamental error by admitting certain evidence in violation of Indiana Evidence Rule 404(b). Foster also argues that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

On April 4, 2004, Paul Wallace lived with his seventeen-year-old son in Harrison County. Wallace planned to sell his 1987 Chevrolet Blazer and Foster, who was an acquaintance of Wallace, had previously expressed interest in purchasing the Blazer. On the morning of April 4, 2004, Foster and Kenny Gilbert went to Wallace's residence to discuss purchasing the vehicle, but Foster informed Wallace that he wanted to test drive the Blazer before buying it. Before leaving on the test drive, Wallace showed Foster the vehicle's title, which he kept in his son's closet. Foster, Gilbert, and Wallace then took the vehicle for a test drive, after which they returned to Wallace's home.

After Wallace locked the door to his residence, the three men drove to Walmart. Wallace went into the store and Foster and Gilbert remained inside the vehicle in the parking lot. When Wallace exited the store after approximately fifteen minutes, he discovered that the vehicle and the two men were gone. Wallace ran back to his residence, where he found

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[1] Ind. Code § 35-43-2-1.

[2] I.C. § 35-43-4-2.

the doors to his home wide open. After telephoning the police, Wallace discovered that items of his son's clothes and jewelry, money, a stereo, and the titles to the Blazer and his trailer were missing. Wallace's next-door neighbor had observed two white males drive up to Wallace's home in the Blazer, enter, and exit five minutes later carrying items from the home.

On May 12, 2005, the State charged Foster with class B felony burglary, class D felony theft, and class D felony auto theft. Foster filed a pretrial motion in limine covering, among other things, Foster's criminal history. The trial court granted the motion. At Foster's jury trial, which began on August 16, 2005, Kathi Plaskett testified that she had seen Foster in April 2004 and that he had bragged about stealing the Blazer and its title. He also told her that he had wrecked the Blazer when he "had been running from the cops or something . . . ." Tr. p. 94. Foster did not object to Plaskett's testimony. On cross-examination, Foster's attorney asked Plaskett, "has he ever threatened you?" Id. at 90. She replied, "[n]o but I know of people he has threatened." Id. Foster did not object to the response.

Officer John Dismang of the Harrison County Sheriff's Department also testified at Foster's jury trial. Officer Dismang stated that in his search for Foster, he had contacted the Floyd County Police Department because he had been informed that Foster might be in jail there. Foster's counsel immediately asked to approach the bench and moved for a mistrial,

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[3] I.C. § 35-43-4-2.5.

but then withdrew the motion and agreed to cross-examine the officer on the subject. On Foster's cross-examination of Officer Dismang, the following exchange occurred:

> Q: By the way you've mentioned, I think inadvertently, that you looked for [Foster] in the Floyd County Jail. Did you find him there?
>
> A: At that time, no I did not.

Id. at 159. Foster did not object to the officer's testimony.

At the conclusion of the trial, the jury found Foster guilty as charged. The trial court sentenced Foster to thirteen years for the burglary conviction, two years for the theft conviction, to be served concurrently with the burglary sentence, and two years for the auto theft conviction, to be served consecutively to the burglary sentence, for a total executed sentence of fifteen years. Foster now appeals.

DISCUSSION AND DECISION

I. Admission of Evidence

Foster argues that the trial court committed fundamental error by admitting certain portions of Plaskett's and Officer Dismang's testimony. A trial court has broad discretion in ruling on the admission of evidence. Oldham v. State, 779 N.E.2d 1162, 1170 (Ind. Ct. App. 2002).

To preserve an issue regarding the admission of evidence for appeal, the complaining party must have made a contemporaneous objection to the introduction of the evidence at trial. Id. Otherwise, the error is waived and need not be addressed by the reviewing court unless the error is fundamental. Id. Our Supreme Court has summarized the extraordinarily narrow fundamental error doctrine as follows:

> We recently re-emphasized the extremely narrow applicability of the fundamental error doctrine in Taylor v. State, 717 N.E.2d 90, 93-94 (Ind. 1999). A fundamental error is "a substantial, blatant violation of basic principles of due process rendering the trial unfair to the defendant." Id. at 93. It applies only when the actual or potential harm "cannot be denied." Id. (citing Ford v. State, 704 N.E.2d 457, 461 (Ind. 1998)). The error must be "so prejudicial to the rights of a defendant as to make a fair trial impossible." Taylor, 717 N.E.2d at 93 (quoting Barany v. State, 658 N.E.2d 60, 64 (Ind. 1995)). An appellate court receiving contentions of fundamental error need only expound upon those it thinks warrant relief. It is otherwise adequate to note that the claim has not been preserved.

Carter v. State, 754 N.E.2d 877, 881 (Ind. 2001).[4]

Indiana Evidence Rule 404(b) prohibits the admission of certain evidence: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Although there are a number of exceptions to the general rule, none are at issue in this case.

Initially, we observe that a defendant may not invite error and then argue on appeal that the error affected his substantial rights. Pinkton v. State, 786 N.E.2d 796, 798 (Ind. Ct. App. 2003). Here, a portion of Plaskett's testimony about which Foster complains occurred during Foster's cross-examination of the witness:

> Q: You testified before that you didn't want to get in the middle of [the situation between Wallace and Foster]. Why is that?
>
> A: Well because to tell you the truth I'm kind of scared of that boy [Foster] right there.
>
> Q: Oh, you're scared of him?

[4] The State argues that in failing to object to the testimony at issue Foster waived this argument. We certainly agree that he waived appellate review under the default abuse of discretion standard. But Foster's failure to object did not waive his right to argue that the admission of the testimony constituted fundamental error.

A: Yeah.

Q: Don't know him that well but you're scared of him?

A: Well . . .

Q: Has he ever threatened you?

A: No but I know of people he has threatened.

Tr. p. 90. It is apparent that Foster invited the error by pursuing this line of questioning. Specifically, by raising questions about the reasonableness of Plaskett's stated fear of Foster, Foster invited her to explain that she was frightened of him because he had threatened other people who she knew.

Furthermore, Foster played a significant role in eliciting the complained-of portion of Officer Dismang's testimony as well. On direct examination, the officer testified that as he searched for Foster, he contacted the Floyd County Police Department because he had been informed that Foster might have been jailed there. Tr. p. 145. Immediately, Foster's attorney objected to the violation of the order in limine preventing the introduction of evidence regarding Foster's criminal history and moved for a mistrial. Out of the hearing of the jury, the following colloquy took place:

> MR. ROBISON: . . . I tendered a motion in limine prior to trial that would include Mr. Foster's criminal record from being discussed by any of the witnesses proffered by the State, because its prejudicial effect would outweigh its probative value. Now the Officer blurts out, in front of the Jury, in response to a question by the State, that he contacted the Floyd County Jail because my client would be at the Floyd County Jail. That is a backdoor way of referring to criminal record without really doing it. The implication is clear. They have prejudiced the jury. I'm moving for a mistrial. They violated the order in limine, Judge.
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> ***

> THE COURT: Well, let me ask you, did you [Officer Dismang] find [Foster] up [at the Floyd County Jail]?
>
> WITNESS: No, I did not.
>
> THE COURT: So it wasn't true. It was not true that he was there. He wasn't in the Floyd County Jail?
>
> WITNESS: They said that they did not ever book him in there, no.
>
> THE COURT: No record of him every [sic] being . . .
>
> WITNESS: Not whenever I called. I didn't ask about previous [sic] or anything else.
>
> THE COURT: Okay. No record of him being there. He wasn't there.
>
> MR. ROBISON: Then we can remedy the problem.
>
> THE COURT: Huh?
>
> MR. ROBISON: We can remedy this problem then.
>
> THE COURT: Are you withdrawing your motion?
>
> MR. ROBISON: Yeah, I'm withdrawing my motion. I'll address it on cross examination, Your Honor.

Id. at 146-47. Subsequently, on cross-examination, the following exchange took place:

> Q: . . . By the way you've mentioned, I think inadvertently, that you looked for [Foster] in the Floyd County Jail. Did you find him there?
>
> A: At that time, no I did not.
>
> Q: He wasn't there?
>
> A: No.

Id. at 159. Foster complains about the officer's statement that he did not find the defendant in jail "[a]t that time," arguing that this testimony implies that Foster had been in jail at another time. It is readily apparent, however, from reviewing this series of events that not only did Foster invite this error, he explicitly countenanced it by withdrawing his objection to

the line of questioning and agreeing to pursue the issue on cross-examination. Thus, Foster may not now complain that the admission of this testimony constituted fundamental error.

Invitation of error notwithstanding, we note that the admission of the complained-of testimony, including Plaskett's statement regarding Foster having wrecked the Blazer while fleeing from the police, was harmless because there is no evidence that it substantially affected the jury and because there is substantial independent evidence establishing Foster's guilt. See Ground v. State, 702 N.E.2d 728, 732 (Ind. Ct. App. 1998) (holding that "the improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt which satisfies the reviewing court that there is no substantial likelihood that challenged evidence contributed to the conviction").

Initially, we observe that on cross-examination, Plaskett admitted that she had not included the detail about Foster fleeing from the police in her original statement to the police, so Foster was able to raise an inference that her memory or honesty may have been faulty. Moreover, as noted above, Foster elicited Officer Dismang's clarification that Foster had not, in fact, been in the Floyd County Jail. Thus, Foster was able to counter any impact that the evidence may have had on the jury.

Additionally, our review of the record reveals the following evidence supporting Foster's guilt: immediately prior to the offense, Wallace showed Foster where he kept the title to the Blazer, tr. p. 52; Wallace left the Blazer in Foster's care when he entered Walmart, id. at 53-54; Wallace's neighbor observed two white men in Wallace's Blazer pull up next to

Wallace's residence and leave carrying certain items, id. at 128-29; and Foster bragged to Plaskett about stealing the Blazer, its title, and other items, id. at 83.

Under these circumstances, we cannot conclude that the three brief, isolated statements of which Foster complains had a substantial affect on the jury. Moreover, the veiled references to Foster's criminal history did not saturate the trial such that their admission rises to the level of reversible error. Cf. Ground, 702 N.E.2d at 732 (holding that State's repeated references to and use of a defective exhibit throughout trial amounted to reversible error). Ultimately, therefore, "after pondering all that happened without stripping the erroneous action from the whole," Stwalley v. State, 534 N.E.2d 229, 232 (Ind. 1989), abrogated on other grounds by Lannan v. State, 600 N.E.2d 1334 (Ind. 1992), we conclude that the judgment was not substantially swayed by the admission of the complained-of testimony.

Foster directs our attention to Oldham v. State, which purportedly requires us to reverse the judgment of the trial court herein. 779 N.E.2d 1162 (Ind. Ct. App. 2002). In Oldham, the defendant, who had been convicted for murder and carrying a handgun without a license, argued that the admission into evidence of his business cards—bearing Oldham's gang nicknames—and a novelty photograph—bearing Oldham's image with brightly-colored text reading "America's Most Wanted," "Wanted for: robbery, assault, arson, jaywalking," "Considered armed and dangerous," and "Approach with extreme caution"—violated Evidence Rule 404. Id. at 1171.

A panel of this court concluded that the cards and the photograph were impermissible character evidence under Rule 404 because the State used the evidence to paint the defendant as a dangerous and armed character. Id. at 1172. In arriving at that conclusion, we found that the State had deliberately attempted to convict Oldham based upon the impermissible evidence. Furthermore, we observed that the error would have been harmless if Oldham had pursued the improperly opened issues or if there had been overwhelming evidence of his guilt. Additionally, we emphasized that the jury had been deadlocked before a juror was excused from service such that the danger was too great that the impermissible testimony had played a role in the verdict. We reversed Oldham's convictions based upon, among other things, the trial court's error in admitting the character evidence.

Here, in contrast to Oldham, there is no evidence that the State deliberately attempted to convict Foster based upon the impermissible evidence. Indeed, two of the three portions of testimony about which Foster complains were admitted during Foster's, rather than the State's, examination of the witnesses. Moreover, the State did not refer to the challenged evidence in its closing argument. Furthermore, Foster did, in fact, pursue Plaskett's testimony regarding his flight from police and Officer Dismang's testimony regarding the phone call to the jail. Finally, there was overwhelming evidence of Foster's guilt and no evidence that the jury herein was close to being deadlocked. Thus, we find the circumstances herein to be distinguishable from Oldham and conclude that the admission of the three isolated portions of testimony at issue did not constitute fundamental error.

II. Foster's Sentence

Foster next argues that the sentence imposed by the trial court is inappropriate in light of the nature of the offenses and his character. As noted above, the trial court sentenced Foster to thirteen years for burglary, which is greater than the presumptive[5] sentence of ten years but less than the maximum possible sentence of twenty years. Ind. Code § 35-50-2-5. The trial court sentence Foster to two years each for the theft and auto theft charges, which is greater than the presumptive sentence of one and one-half years but less than the maximum possible sentence of three years. I.C. § 35-50-2-7. The trial court ordered the theft sentence to be served concurrently and the auto theft sentence to be served consecutively to the burglary sentence, for a total executed sentence of fifteen years.

Turning first to the nature of the offenses, we note that Foster was an acquaintance of the victim and had expressed an interest in purchasing Wallace's Blazer. Wallace, therefore, trusted Foster and Foster abused that trust when he stole the vehicle. Moreover, Foster invaded Wallace's home and stole a number of items worth $3,000, which was a large financial loss for Wallace.

As to Foster's character, we note that Foster has an extensive juvenile and criminal record. As a juvenile, Foster was charged with possession of a handgun and curfew violation, was arrested for theft twice, and was adjudicated a delinquent in 1995. As an adult, Foster amassed convictions for receiving stolen property, theft, possession of cocaine,

[5] The General Assembly amended Indiana's sentencing statutes by P.L. 71-2005, sec. 7, with an emergency effective date of April 25, 2005, to alter "presumptive" sentences to "advisory" sentences.

and possession of a controlled substance, all as class D felonies. Furthermore, Foster's probation was revoked in every case where it was ordered and Foster was on probation when he committed the instant offenses. Thus, Foster has a consistent and steady record of criminal activity and has established a marked disregard for the criminal justice system and the laws governing our society. We need not comply with Foster's request to afford mitigating weight to the nonviolent nature of his criminal history. See Banks v. State, 841 N.E.2d 654, 659 (Ind. Ct. App. 2006) (holding that court is not obligated to give mitigating weight to the nonviolent nature of crimes that are nonviolent by definition), trans. denied.

Foster asks that we take into consideration the fact that he was addicted to methamphetamine at the time he committed the instant offenses. The record reveals, however, that he has failed to take advantage of treatment opportunities extended to him as a term of his probation for previous offenses. If anything, therefore, Foster's drug addiction acts as an aggravator rather than a mitigator. See Bryant v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004) (finding defendant's drug use to be an aggravator rather than a mitigator because he had been aware of his drug and alcohol problem but had taken no steps to treat it), trans. denied.

Here, the trial court sentenced Foster to less than the maximum term for all three convictions. Given the nature of the offenses and Foster's character as described above, we cannot conclude that the sentence was inappropriate.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.